

FILED

OCT 26 2015

Clerk, U.S. District Court
District Of Montana
Missoula

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

DONNIE MACK SELLERS,

Plaintiff,

vs.

MICHELE STEYH and JANE DOE,

Defendants.

CV 13-44-H-DWM-JTJ

ORDER

Plaintiff Donnie Mack Sellers, a prisoner proceeding pro se, alleges in his Amended Complaint that Defendant Michele Steyh, a unit manager at Montana State Prison, violated his constitutional rights by failing to protect him from an assault by a fellow inmate. (Doc. 14.) Defendant Steyh filed a Motion for Summary Judgment. (Doc. 38.) Magistrate Judge John Johnston entered Findings and Recommendations, recommending that the motion be granted and, consequentially, that three additional motions filed by Sellers be denied. (Doc. 73.) Sellers timely filed objections. (Doc. 74.)

Sellers is entitled to *de novo* review of the specified findings or recommendations to which he objects. 28 U.S.C. § 636(b)(1); *McDonnell*

Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Where there is no objection, the court is to give the level of consideration it deems appropriate. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) (“It does not appear that Congress intended to require district court review of a magistrate’s factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings.”). This Court reviews for clear error.

Sellers does not reference any specific findings or recommendations to which he objects and instead makes general accusations that do not leave the Court with a “definite and firm conviction that a mistake has been committed.” *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal., Inc.*, 508 U.S. 602, 623 (1993) (internal quotation marks omitted). Sellers claims that Judge Johnston did not consider the facts of the case. Yet, a review of the surveillance video of the October 24, 2010 incident that gives rise to Sellers’s claim shows that Sellers threw the first punch and that summary judgment in Defendant Steyh’s favor is therefore appropriate. *See Indreland v. Yellowstone Cnty. Bd. of Commrs.*, 693 F. Supp. 2d 1230, 1243 (D. Mont. 2010) (failure-to-protect claim fails as a matter of law where the plaintiff was initiator in altercation). Sellers claims that he did not receive Defendant Steyh’s response to his Motion for Preliminary Injunction, but the Certificate of Service attached to

the response certifies that it was served on Sellers by mail. (Docs. 59 at 3; 60 at 10.) Sellers states that his Motion to Dismiss without prejudice is not unreasonable; however, dismissing this action without prejudice at this stage is inappropriate. *See Williams v. Peralta Community College Dist.*, 227 F.R.D. 538, 540 (N.D. Cal. 2005) (factors to consider in assessing dismissal under Rule 41(a)(2)). Sellers's remaining objections amount to attacks on the Court's integrity and new allegations that he has been recently assaulted, none of which will be entertained by the Court.

Accordingly, IT IS ORDERED that the Findings and Recommendations (Doc. 73) are ADOPTED IN FULL.

IT IS FURTHER ORDERED that Defendant Steyh's Motion for Summary Judgment (Doc. 38) is GRANTED and this action is DISMISSED.

IT IS FURTHER ORDERED that Sellers's Motion for Preliminary Injunction (Doc. 53) is DENIED.

IT IS FURTHER ORDERED that Sellers's Motion to Amend (Doc. 55) is DENIED.

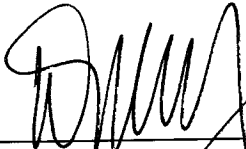
IT IS FURTHER ORDERED that Sellers's Motion to Dismiss without prejudice (Doc. 72) is DENIED.

IT IS FURTHER ORDERED that the Clerk of Court is directed to close this

matter and enter judgment in favor of Defendants pursuant to Rule 58 of the Federal Rules of Civil Procedure.

IT IS FURTHER ORDERED that the Clerk of Court shall have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith.

DATED this 26th day of October, 2015.



Donald W. Molloy, District Judge
United States District Court

